ber of cars, and as to the character of the vehicles? Regarding the number of cars, the extent of the obligation is summarized in the Sonman Coal Company case. In normal times the carrier's duty is measured by common law, that is by the reasonable requests of the shipper based upon his actual needs, and no administrative question is ordinarily involved. In such a situation, jurisdiction is not exclusively in the Interstate Commerce Commission, but can be exercised equally by the Federal or a state court. While in abnormal times, that is, in times of car shortage, the extent of the obligation to furnish cars is one of reasonableness which directly involves an administrative question and thus jurisdiction is exclusively in the Commission.[9] Regarding the character of vehicles, the Oil Tank Car cases hold that the extent of such obligation is measured entirely by common law and is enforceable at no time by the Commission, but solely by the courts. Whether the courts would compel the carrier to furnish special vehicles is another question depending, among other things, upon the conditions of trade and the business of the shipper.

P. H. R.

CONSTITUTIONAL LAW—DUE PROCESS CLAUSE—RESTRICTIONS ON USE OF LAND—An increasing community sense throws into sharp relief the extremely individualistic attitude of the common law. In the contemplation of the latter the right of the land-owner extends *usque ad caelum,* and, subject only to the limitation that he inflict no injury upon another, he may use his property for any purpose he sees fit. It is only when a nuisance is created that his neighbors may invoke the aid of the courts. But the term *nuisance* has become associated largely with smudgy chimneys, defective reservoirs and cess-pools. Against the erection of structures repugnant to the artistic sensibilities of the neighborhood, there seems to be no remedy.

It is not that esthetic considerations are above—or beneath the jurisdiction of the courts. A municipality, it is now well settled, may impose taxes for just such purposes; it may acquire land to be used for parks, libraries, art-galleries, convention halls . . . provided only that it compensates the owner.[1] The point upon which the law is less satisfactory is as to the right of a city to enjoin the property owner from a use of his property which cannot be technically termed a nuisance.[2]

The present attitude of the courts can be stated briefly.

[9] This is, of course, *dictum* by the court, based upon the words in the Puritan Coal Company case.

[1] Attorney-General v. Williams, 174 Mass. 476 (1899).

[2] Commonwealth v. Boston Advertising Co., 188 Mass. 348 (1905).

"Esthetic considerations," it has been said, "are a matter of luxury and indulgence." [3] "The preservation of the architectural symmetry of Copley Square," is not a ground for restricting a property owner from a normal use of his property.[4]

Statutes aiming to preserve or enhance the beauty of a community are numerous, ranging from those which for police as well as for artistic purposes, limit the height of buildings in certain sections,[5] to those which prohibit the establishment of retail stores in residential neighborhoods.[6] Wherever the constitutionality of a statute of this type has been in issue, the individualistic test of the common law has been rigidly applied. "The cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color, may be distasteful to the refined senses of some, yet government can neither control nor regulate in such affairs." [7] The same considerations have declared unconstitutional a statute which forbade the erection of bill-boards or advertising signs within a certain distance from a municipal boulevard.[8] Unless essential to the public health, the public safety or the public welfare, no restriction upon the uses to which land may be put will be countenanced by the courts. A court will go further. It will inquire into the real purpose of any statute, and if it believes that the act is only ostensibly and not primarily a police measure, it will not uphold it.[9] So also it may consider the aim of the act to be police, and yet may hold it invalid because the execution of the act is left to the arbitrary discretion of a few individuals.[10]

In a very recent case a statute sought to prevent the erection of bill-boards upon the Palisades of the Hudson.[11] The act was declared unconstitutional. While this latest decision is in accord with the traditions of the American courts, it leaves open several effective loop-holes by which the general purpose of such a statute may be brought about. Civic beauty and civic safety are not irreconcilable terms, and if an act can be justified as a valid exercise of the police power, the fact that it incidentally conduces to beautify the city, will not invalidate it.[12] In many cases, too, esthetic considerations *have* been taken into account by the courts. It has

[3] Cochran v. Preston, 108 Md. 220 (1908).

[4] Attorney-General v. Williams, *supra.*

[5] Esbank v. Richmond, 226 U. S. 137 (1912).

[6] People v. Chicago, 261 Ill. 16 (1913).

[7] Curran Bill Posting Co. v. Denver, 47 Col. 221 (1909).

[8] Commonwealth v. Boston Adv. Co., 188 Mass. 348 (1905).

[9] Haller Sign Works v. Physical Culture School, 249 Ill. 436 (1911).

[10] Bostock v. Lewis, 95 Md. 400 (1902).

[11] State v. Lamb, 98 Atl. 459 (N. J. 1916).

[12] Welch v. Swasey, 193 Mass. 364 (1907). Affirmed in 214 U. S. 91 (1908).

been judicially recognized that a manufacturing district must submit to annoyances which would be enjoined in a residential neighborhood.[13] And the converse of the proposition is often decided though seldom clearly expressed. In addition, an offensive odor seems to be a nuisance *per se,* its effect on the health of the community being immaterial. It is difficult to grasp the logical difference between this form of nuisance and an architectural monstrosity that is an eye-sore to surrounding residents. The practical consideration that seems to determine the stand of the courts is, that the first, the nasal, sense is universal. No expert testimony is necessary, and no conflict of testimony is likely. The artistic sense, on the other hand, is localized in a comparatively few of the esthetically cultivated, among whom also there are apt to be essentially divergent views as to what constitutes good taste.

Unfortunately the very material aspect of the question has not been stressed. The man who opens up a laundry in a residential section may outrage the refined sensibilities of his neighbors. In so far the result is merely sentimental and properly disregarded by the law. But very often the value of property in the vicinity is considerably lowered. The exercise of certain rights of ownership by one party may reprive a hundred others from using their property in a normal manner. The use of one property for manufacturing purposes may preclude the use of adjacent property for any but the same purpose.

The present attitude of the courts leaves much to be desired. But it is definite. An alternative view would unsettle the property rights of the community. In an extreme case, for example, it was sought to prohibit the erection of residences near a drive-way which skirted the shore of a bay, because they obstructed the view to the bay and the breezes therefrom.[14] The merits of such a controversy cannot be decided by the courts, nor indeed by the executive of legislative departments under our conception of government. Another philosophy of government which has emphasized the paramount importance of the state has enabled the continental authorities to achieve a standard of municipal development which is the envy of American cities. It is a curious paradox, that at this time when the collective sense is stronger than ever before in America, paternalism in government is under a ban, and individual freedom is deemed the special jewel of Anglo-Saxon jurisprudence.

B. W.

INTERNATIONAL LAW—CONTRABAND—CONFISCATION OF VESSEL CARRYING CONTRABAND—In the light of the present war conditions, the problem of the penalty to vessels of neutrals for the car-

[13] Sullivan v. Steel Company, 208 Pa. 543 (1904).

[14] Quintine v. Bay St. Louis, 64 Miss. 483 (1886).